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No. 88-830

In the Supreme Court of the United States

OCTOBER TERM, 1988

QUALITY INN SOUTH, ET AL., PETITIONERS

v.

RAJNI J. PATEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals correctly held that undocumented aliens are "employees" for purposes of Section 3(e)(1) of the Fair Labor Standards Act of 1938, 29 U.S.C. 203(e)(1) (1982 & Supp. IV 1986), and thus may recover minimum wages and overtime pay owed under the Act.

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INTEREST OF THE UNITED STATES

This case raises the question whether undocumented aliens are protected by the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* Section 3(e)(1) of the FLSA defines the term "employee" to mean "any individual employed by an employer." 29 U.S.C. 203(e)(1) (1982 & Supp. IV 1986). The Secretary of Labor, the official charged with enforcing the FLSA, consistently has interpreted this provision to include undocumented alien workers. Indeed, the Secretary has aimed a major part of her FLSA enforcement efforts at industries and localities where undocumented aliens traditionally have been found to be employed. In this private FLSA enforcement action brought by an undocumented alien, the district court invited the Secretary to present her views on the question of FLSA coverage, but rejected the Secretary's construction of the statute. The Secretary participated as an amicus curiae in the court of appeals, which reversed the decision of the district court and accepted the Secretary's inter-

pretation. Accordingly, the Department of Labor has a substantial interest in this case.

STATEMENT

1. Congress enacted the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. 202(a). Congress also found that the existence of substandard working conditions "constitutes an unfair method of competition in commerce" and "interferes with the orderly and fair marketing of goods in commerce." 29 U.S.C. 202(a)(3) & (5). To combat these and other consequences of substandard employment, the FLSA requires covered employers, among other things, to pay their employees a statutorily prescribed minimum wage for each hour worked (29 U.S.C. 206), and to pay their employees who are required to work more than 40 hours per week at one and one-half times their regular rate of pay for each overtime hour (29 U.S.C. 207(a)(1)). The FLSA broadly defines the term "employee" to include "any individual employed by an employer" (29 U.S.C. 203(e)(1) (1982 & Supp. IV 1986)). Section 16(b) permits injured employees to bring an action against an employer for unpaid minimum wages and overtime compensation, and for an additional equal amount as liquidated damages (29 U.S.C. 216(b)). The Secretary of Labor is also authorized to sue for unpaid wages and liquidated damages on behalf of injured employees (29 U.S.C. 216(c)), and may seek to enjoin violations of the minimum wage and overtime pay provisions (29 U.S.C. 217).

The Immigration and Nationality Act of 1952 (INA), 8 U.S.C. 1101 *et seq.*, imposes numerical limitations and

prescribes qualifications for the legal admission of aliens, and sets forth requirements and procedures for their entry and stay in the United States. Congress sought in the INA to preserve jobs for American workers and to protect American workers' wage rates and working conditions. See *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 893 (1984). To this end, the INA provides that immigrant aliens may not be permanently admitted into this country for purposes of employment unless their employment "will not adversely affect the wages and working conditions of the workers in the United States similarly employed." 8 U.S.C. 1182(a)(14). The INA also defines the relevant category of nonimmigrant aliens as persons coming temporarily to the United States to work "if unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. 1101(a)(15)(H)(ii) (1982 & Supp. IV 1986).

In 1986, Congress enacted the Immigration Reform and Control Act (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, which comprehensively amended the INA to include new measures for controlling illegal immigration to the United States. Significantly, IRCA added provisions which for the first time impose penalties on employers who, after November 6, 1986, knowingly hire aliens who are not authorized to work in this country. See 8 U.S.C. 1324a(a), (e)(4) & (f)(1) (Supp. IV 1986). IRCA does not, however, make it a separate offense for an undocumented alien to accept employment in this country.

2. The relevant facts are undisputed. Respondent Rajni J. Patel is a citizen of India who entered the United States on June 1, 1982, pursuant to a visitor's visa (Pet. App. B2). Although his visa expired after six weeks, Patel remained in this country (*ibid.*). From July until October 1985, he worked for petitioners Sumani Corporation and

its two majority stockholders at a hotel, the Quality Inn South, that they operated in Birmingham, Alabama (*ibid.*).

In August 1986, Patel brought this action against petitioners under Section 16(b) of the FLSA, seeking to recover unpaid minimum wages and overtime compensation, an additional equal amount as liquidated damages, and attorney's fees (Pet. App. A1-A2). Ruling on petitioners' motion for summary judgment, the district court held that, as an undocumented or illegal alien,[1] respondent could not bring an action under or recover for alleged violations of the FLSA. Specifically, the court concluded that an illegal alien is not an "individual" for purposes of the Act's definition of "employee," which includes "any individual employed by an employer" (*id.* at A8). The court also concluded that providing FLSA protection to illegal aliens irreconcilably conflicts with IRCA because it "encourages the alien illegally to obtain entry into the United States and to work here," whereas "Congress has now implemented a policy of discouraging the entry and employment in this country of illegal aliens" (*id.* at A8, A14). The court acknowledged (*id.* at A8-A10) that in *Sure-Tan,* this Court held that the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, prohibits unfair labor practices committed against undocumented workers, but concluded that Congress intended in IRCA "to correct

[1] The terms "illegal" and "undocumented" aliens are used interchangeably in this brief to refer to noncitizens who may be subject to deportation. They include individuals who have entered the United States without authorization as well as those, like Patel, who have violated a condition of entry, for example, by exceeding the temporary period of authorized stay or by taking employment when not authorized to do so.

a policy in the past of allowing illegal aliens the full protection of all laws designed to protect workers legally within this country" (Pet. App. A13).

3. The Eleventh Circuit reversed, holding that "undocumented workers are 'employees' within the meaning of the FLSA and that such workers can bring an action under the act for unpaid wages and liquidated damages" (Pet. App. B13). The court found that the "overwhelming weight of authority" supports the conclusion that the FLSA protects undocumented aliens (*id.* at B7). It emphasized that the language, structure, and history of the statute unequivocally show that "Congress intended an all encompassing definition of the term 'employee' that would include all workers not specifically excepted" (*id.* at B4). The court added that this Court's decision in *Sure-Tan*, holding undocumented aliens to be "employees" within the meaning of the NLRA, "weighs heavily in favor" of reaching the same conclusion under the FLSA, because the two acts have similar objectives and employ similar definitions of the term "employee" (*id.* at B6). Moreover, the court stated, the Department of Labor, whose interpretation of the statute "is entitled to considerable deference," has long interpreted the FLSA to cover undocumented aliens (*id.* at B6-B7).

The court of appeals rejected the district court's conclusion that Congress intended IRCA to limit the rights of undocumented aliens under the FLSA, finding instead that "IRCA's legislative history strongly suggests that Congress believed that undocumented aliens would continue to be protected by the FLSA," and that "the FLSA's coverage of undocumented aliens goes hand in hand with the policies behind the IRCA" (Pet. App. B8-B9). The court recognized "the seeming anomaly of discouraging illegal immigration by allowing undocumented aliens to

recover in an action under the FLSA" without regard to his immigration status, but explained that "[b]y reducing the incentive to hire such workers the FLSA's coverage of undocumented aliens helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA" (*id.* at B10).

Finally, the court of appeals rejected the argument that *Sure-Tan* prevents undocumented workers from recovering back pay under the FLSA for periods when they were not legally present in the United States. In that case the Court concluded that illegal aliens who had left the country should be deemed "unavailable" for work, and therefore ineligible for a back pay award under the NLRA, while they were out of the country. 467 U.S. at 897, 903. Here, the court of appeals stated, the question is whether an employee can recover unpaid minimum wages and overtime "for work *already performed*" (Pet. App. B12). Since "[i]t would make little sense to consider Patel 'unavailable' for work during a period of time when he was actually working" (*ibid.*), the court concluded that "Patel is entitled to the full range of available remedies under the FLSA," and remanded the case for a determination on the merits of his claim (*id.* at B13).

ARGUMENT

The court of appeals correctly determined that Congress intended the FLSA to cover undocumented aliens, and that nothing in IRCA, its policies, or purposes precludes undocumented aliens from recovering an award of back pay or liquidated damages under the FLSA. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. Moreover, the entire period of employment at issue in this case predates the passage of IRCA, and the court of appeals' opinion is confined to the definition of "employee" in the FLSA. Accordingly, further review is unwarranted.

1. The court of appeals correctly held that undocumented alien workers are "employees" within the meaning of the FLSA and thus may recover under Section 16(b) of the Act for minimum wage and overtime pay violations. As this Court has explained, Congress expansively defined the term "employee" in the FLSA to encompass "any individual employed by an employer" (29 U.S.C. 203(e)(1) (1982 & Supp. IV. 1986)), and specifically identified any exemptions to FLSA coverage (29 U.S.C. 213); thus it clearly intended to include all employees within the scope of the statute unless specifically excluded. See *United States* v. *Rosenwasser,* 323 U.S. 360, 362-363 (1945). There is no exception to FLSA coverage for undocumented aliens. The statutory language therefore unequivocally embraces all individuals employed by a covered employer irrespective of their immigration status or legal authority to accept work. Cf. *Citicorp Industrial Credit, Inc.* v. *Brock,* No. 86-88 (June 22, 1987) (that Congress identified only two narrow categories of persons who are not subject to the "hot goods" provision of the FLSA suggests that all other persons are covered).

Interpreting similar definitional provisions in the NLRA, this Court concluded that "[s]ince undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of 'employee.' " *Sure-Tan*, 467 U.S. at 891-892. This Court's interpretation of NLRA coverage is particularly persuasive here because the NLRA and the FLSA address related concerns and share similar objectives. Application of FLSA protections to undocumented alien workers not only promotes the health and well-being of those workers, but also assures that " '[a]cceptance by illegal aliens of jobs on substandard terms as to wages and working conditions [will] seriously depress wage scales

and working conditions of citizens and legally admitted aliens.' " *Sure-Tan*, 467 U.S. at 892 (citation omitted). In addition, by eliminating the unfair competitive advantage accruing to employers that maintain substandard working conditions, FLSA coverage of undocumented aliens also furthers Congress's goal " 'that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions * * *.' " *Citicorp Industrial Credit, Inc.* v. *Brock*, slip op. 9 (citation omitted).

Moreover, for more than 40 years the Secretary of Labor, whose construction of the FLSA is entitled to considerable deference (*Tony and Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290, 297 (1985)), consistently has interpreted the Act to cover undocumented alien workers, and has enforced the statute and obtained relief on their behalf. See, *e.g.*, *Donovan* v. *MFC, Inc.*, 100 Lab. Cas. (CCH) ¶ 34,519 (N.D. Tex. Dec. 27, 1983); *Donovan* v. *Burgett Greenhouses, Inc.*, 100 Lab. Cas. (CCH) ¶ 34,504 (D.N.M. Nov. 23, 1983); *Brennan* v. *El San Trading Corp.*, 73 Lab. Cas. (CCH) ¶ 33,032 (W.D. Tex. Dec. 26, 1973).[2] Such deference is particularly war-

[2] As early as 1942, the Wage and Hour Administrator opined that alien prisoners of war "are in the same category as any other person" for purposes of the FLSA and must be paid the minimum wage. See Administrator's letter of Jan. 9, 1942, to Col. Percy B. McClung, Alien Enemy Internment Camp. And, at least since 1981, the Secretary has focused a major part of her FLSA enforcement effort—the Special Targeted Enforcement Program (STEP)—at industries and localities where undocumented aliens traditionally have been found to be employed. In 1980, the Comptroller General reviewed the Department's use of appropriated funds to enforce the FLSA on behalf of undocumented aliens and concluded that this program activity, a precursor of the STEP program, was lawful even though at the time (from 1978-1980) Congress had included a spending restriction in the Department's overall appropriation which expressly prohibited the use of appropriated funds "to carry out any

ranted here because Congress recently narrowed the definition of "employee" to exclude certain state and local government employees (see 99 Stat. 790 (1985)), but did not modify the Secretary's interpretation of the statute to exclude illegal aliens. See *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833, 845-846 (1986). And the only other court of appeals that has directly addressed the issue concluded, as did the court below, that the Act's protections apply to undocumented aliens. See *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987), cert. denied, No. 87-1609 (June 30, 1988); see also *Lopez* v. *Rodriguez*, 668 F.2d 1376, 1378 n.4 (D.C. Cir. 1981) (finding no merit in contention that enforcing the FLSA on behalf of illegal aliens would undermine enforcement of immigration laws).[3]

2. Petitioners do not appear to question that Congress intended the FLSA as originally enacted to protect un-

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activities for or on behalf of any [undocumented] * * * alien * * *." Department of Labor Appropriation Act, 1979, Pub. L. No. 95-480, § 102, 92 Stat. 1571. Because the program "does nothing to enhance the alien worker's position or rights vis a vis legal American workers or in any way confer on such aliens additional benefits to which they would not otherwise be entitled," the Comptroller General concluded that "this program cannot be said to be 'on behalf of' illegal aliens." Comptroller Gen. Op. No. B-198205 (May 20, 1980).

[3] As petitioner acknowledges (Pet. 12-13), the courts have also held in numerous other contexts that undocumented aliens enjoy labor law protections. See *Local 512, Warehouse & Office Workers' Union* v. *NLRB*, 795 F.2d 705, 718 n.12 (9th Cir. 1986) (collecting cases). Most recently, in *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 860 F.2d 1168, 1173 (1988), the Second Circuit held, by analogy to *Sure-Tan*, that the protections of Title VII of the Civil Rights Act of 1964 "must apply to undocumented workers, at least to the extent that those protections do not conflict with immigration laws."

documented alien workers. Rather, they challenge the court of appeals' conclusion (Pet. App. B8-B10) that following the passage of IRCA, undocumented aliens continue to enjoy FLSA protections. Focusing on Congress's determination in IRCA to impose penalties on employers who knowingly hire or continue to employ undocumented aliens, petitioners argue that after the enactment of IRCA the question of FLSA coverage turns on whether the alien was " 'authorized' to accept employment in the United States" (Pet. 20-21), and conclude that "IRCA's comprehensive scheme precludes enforcement of many employment-related protections by illegal alien workers" (Pet. 25). As the court of appeals pointed out, however, IRCA does not expressly amend the FLSA to limit that Act's protections to "authorized" alien employees, and "nothing in the IRCA or its legislative history suggests that Congress intended to limit the rights of undocumented aliens under the FLSA. To the contrary, the FLSA's coverage of undocumented aliens is fully consistent with the IRCA and the policies behind it." Pet. App. B8. Thus, consideration of the "immigration law interests affected" (Pet. 20), as reflected in IRCA, yields no different result than does analysis of the issue under the terms of the FLSA.

As the court of appeals noted (Pet. App. B8-B9), IRCA's legislative history demonstrates that Congress intended to continue FLSA protection of undocumented workers. Reporting on the bill that formed the basis for IRCA, the House Judiciary Committee expressly stated its intent not to affect this Court's holding in *Sure-Tan* that the NLRA definition of "employee" includes illegal aliens, and not to "undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or

labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law." H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, at 58 (1986). The House Education and Labor Committee stated even more specifically that "the committee does not intend that any provision of this Act would limit the powers of * * * the Wage and Hour Division of the Department of Labor * * * in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies," because "[t]o do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment." H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 2, at 8-9 (1986). Indeed, IRCA expressly authorized the appropriation of additional sums "for enforcement activities of the Wage and Hour Division * * * in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens." 8 U.S.C. 1101 note (Supp. IV 1986). By providing increased funding to remove economic incentives to employers, Congress obviously intended the Secretary to enforce the FLSA's wage and hour requirements with respect to illegal aliens.

Petitioners erroneously argue that allowing illegal immigrants to invoke traditional labor law protections—as in this suit for unpaid wages and damages under the FLSA—"will perpetuate and encourage illegal immigration in direct contravention of the purposes of IRCA" (Pet. 21). As the court below acknowledged, there is a "seeming anomaly [in] discouraging illegal immigration by

allowing undocumented aliens to recover in an action under the FLSA" (Pet. App. B10). But the court correctly understood that undocumented workers do not enter this country to gain the protection of the United States' minimum wage or other labor laws. "Rather it is the hope of getting a job—at any wage—that prompts most illegal aliens to cross our borders" (*ibid.*). And the court recognized that because application of the FLSA to undocumented workers reduces an employer's incentive to hire such workers, it "helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA" (*ibid.*). As explained in *Sure-Tan,* "[i]f an employer realizes that there will be no advantage * * * in preferring illegal aliens * * * any incentive to hire such illegal aliens is correspondingly lessened," and "[i]n turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws." 467 U.S. at 893-894.[4] In sum, enforcement of the FLSA with respect to undocumented aliens is consistent with the policies of IRCA because it provides an additional disincentive for employers to hire illegal aliens.

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[4] The court of appeals' conclusion that job availability, and not wage guarantees, is the most important factor in illegal immigration finds support in the report of the Select Commission on Immigration and Refugee Policy. The Select Commission noted that "studies indicate that undocumented/illegal aliens are attracted to the country by U.S. employment opportunities," and "[h]owever low the salaries of undocumented/illegal aliens in the United States, * * * their U.S. wages are many times that of previous wages in the home country." House and Senate Comm. on the Judiciary, 97th Cong., 1st Sess., *U.S. Immigration Policy and the National Interest* 36-37 (Joint Comm. Print No. 8 (1981)). The Select Commission's findings and recommendations laid the foundation for IRCA. See S. Rep. No. 132, 99th Cong., 1st Sess. 21-26 (1985) (chronicling the history of immigration reform).

In any event, the IRCA provision making it unlawful for an employer to hire an undocumented alien (8 U.S.C. 1324a(a) (Supp. IV 1986)) does not apply retroactively (see 8 U.S.C. 1324a(i) (Supp. IV 1986)), and, as petitioners acknowledge (Pet. 23), all of the FLSA violations alleged in this case occurred before the enactment of IRCA. Accordingly, the question whether undocumented aliens are covered by the FLSA following the passage of IRCA is not squarely presented on the facts of this case.

3. Nor is there any merit to the petitioners' argument (Pet. 19-20) that *Sure-Tan* precludes courts from providing remedies to undocumented aliens for violations of the FLSA. As the court of appeals recognized, the remedial constraints identified by this Court in *Sure-Tan* have no application here. *Sure-Tan* involved a court-ordered six-month backpay award to illegal alien employees who had been discriminatorily discharged in violation of the NLRA and had voluntarily departed the country to avoid deportation. Because the employees in *Sure-Tan* had immediately left the country and were not available for reinstatement or work during the specified backpay period, the Court found that the award of back pay "constitute[d] pure speculation" and presented a potential conflict with the INA. 467 U.S. at 901, 903. The Court therefore conditioned the offers of reinstatement on the employees' legal reentry into the United States and tolled the accrual of back pay "during any period when they were not lawfully entitled to be present and employed in the United States." *Id.* at 903. By contrast, in this case neither reentry nor reinstatement is at issue and the unpaid wages claimed by respondent have fully accrued and are certain. In short, *Sure-Tan* does not require that undocumented alien workers must be denied FLSA remedies for hours they actually worked.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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